No._____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

JOSEPH M. STOVER,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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99 PP

QUESTIONS PRESENTED FOR REVIEW

(1) Does a railroad employee in a Federal Employers' Liability Act case have to prove the railroad's negligence was the probable cause of the accident?

(2) Did the Supreme Court of Virginia impose an unduly restrictive view of foreseeability of harm contrary to the judicial precedent of this Court?

(3) Did the Supreme Court of Virginia in reviewing the sufficiency of the evidence ignore the well established precedent in a Federal Employers' Liability Act claim that a railroad employee has met his burden of proof where the evidence and inferences viewed in the light most favorable to the employee establishes the employer's negligence played any part in producing an injury?

PARTIES

The names of all parties are listed in the caption and style of the case.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOSEPH M. STOVER,
. . . . . *Petitioner,*
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
. . . . . *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The Opinion of the trial court was not officially reported but is reported in the Appendix at pages six to twenty-seven.

The Opinion of the Supreme Court of Virginia denying Stover's Petition for Appeal and Affirming the Decision of the Trial Court is reported in 249 Va. 192 (1995). This Opinion has not yet been reported in the Southeastern Regional Reporter System. The Opinion of the

Supreme Court of Virginia is reported in the Appendix at pages thirty-five to sixty-one.

The Opinion of the Supreme Court of Virginia Denying Joseph Stover's Petition for Rehearing will not be officially reported and is reported in the Appendix at page sixty-two.

GROUNDS FOR JURISDICTION

1. Your Petitioner is seeking to review the Supreme Court of Virginia's March 3, 1995 Order and Opinion Affirming the Trial Court's Decision Setting Aside the Jury Verdict. (App. 34-61).

2. Your Petitioner timely filed a Petition for a Rehearing with the Supreme Court of Virginia and this Petition for a Rehearing was denied by the Supreme Court of Virginia on April 21, 1995. (App. 62).

3. Your Petitioner asserts that the Supreme Court has jurisdiction

pursuant to §28 U.S.C. 1257.

STATUTE INVOLVED

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, road bed, works, boats, wharfs, or other equipment." See 45 U.S.C. §51 of the Federal Employer's Liability Act.

STATEMENT OF CASE

Joseph M. Stover ("Stover"), plaintiff, filed suit in the Circuit Court of Roanoke seeking damages for personal injuries sustained in the course of his employment with the defendant,

Norfolk and Western Railway Company ("Norfolk and Western"). Stover based his claim on the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 at seq. The jury returned a verdict against Norfolk and Western and awarded Stover Five Hundred Thousand Dollars ($500,000.00) in damages. (App. 1-5). After post trial motions and argument, the Circuit Court of Roanoke set aside the jury verdict and entered final judgment for Norfolk and Western. (App. 27-31). The trial court ruled that Stover's expert opinion testimony as to the cause of the accident was supported by nothing more than conjecture and supposition (App. 6-23), and it was incumbent on Stover to introduce evidence that will support a reasonable inference that the defect was <u>the</u> probable cause of the accident (App. 6-23). *emphasis added.*

Stover noted his appeal and assigned as error the trial court's ruling that there was not sufficient evidence to support a verdict under FELA. (App. 31). Stover also assigned as error the trial court's ruling that Hockaday's expert opinion testimony did not make a jury issue as to the cause of the derail operating improperly (App. 31, 32).

The Supreme Court of Virginia granted Stover's Petition for Appeal. (App. 32-34). On March 3, 1995, the Supreme Court of Virginia in a written opinion, and a court order, affirmed the decision of the trial court (App. 34-61). The Supreme Court of Virginia followed the trial court's ruling that Stover must introduce evidence supporting a reasonable inference that the alleged defect was the probable cause of the accident. (App. 55-56). In addition,

the Supreme Court of Virginia held that Stover did not prove that the condition of the appliance was foreseeably dangerous because it was incumbent on Stover to show that Norfolk and Western "with the exercise of reasonable care, could have discovered a defect in a device and remedied the situation". (App. 60, 61).

Stover then petitioned for a rehearing but the Petition for a Rehearing was denied by the Supreme Court of Virginia on April 21, 1995. (App. 62).

Stover, a brakeman, was injured while operating a derail that hung up. Stover claimed he was operating the derail properly. Stover maintained that the derail hung up because it was not properly lubricated and maintained. The derail was a hand operated device

weighing about 90 pounds that was used by the railroad to prevent cars from entering a main line from a side track. Stover's job was to unlock the derail and move it from left to right to get the derail off the track so the train movement could be completed. Stover unlocked the derail, pulled up and was trying to move it from left to right when it hung. Stover then reached back to give the handle of the derail another jerk and added more pressure when the derail flopped over injuring Stover. Stover does not dispute that the handle of the derail had been recently replaced, but other parts of the derail and housing had been at the same location for years. The handle, housing and derail had areas of friction-metal to metal-that required lubrication and maintenance.

Prior to his injury, Stover had made

complaints about switches and derails being hard to throw in the Rocky Mount area (the area where Stover was injured), but had not complained about the particular derail that injured him. Other employees of Norfolk and Western had complained about derails and switches needing lubrication in the Rocky Mount area but there had not been a complaint about the derail that injured Stover.

Evidence established that Norfolk and Western would not lubricate derails in the Rocky Mount area until someone complained or until they were hard to throw. Derails were only lubricated if and when needed. Gearhart, the Norfolk and Western official in charge of maintaining derails in the Rocky Mount area, agreed that it was Norfolk and Western's policy to lubricate derails only if they were hard to throw.

Photographs taken of the derail by Norfolk and Western at the time of the accident did not show that the derail was lubricated. Photographs taken over a month after the accident showed the derail was lubricated.

Stover and other employees of Norfolk and Western established that the derail was not lubricated at the time of his injury. Norfolk and Western maintained that the handle of the derail was lubricated at the factory before it was recently installed, but there was no evidence that other moving parts of the derail had been lubricated. Gearhart, an official of Norfolk and Western whose direct responsibility was to maintain and lubricate the derails at Rocky Mount where Stover was injured, stated that neither the stand nor the derail had been lubricated for a long period of time.

None of the railroad officials who operated the derail after Stover's injury could state that the derail was lubricated. Gearhart, whose job was to inspect the derail after the accident, could not answer the question whether there was any lubrication or graphite on the derail. Norfolk and Western did not have any written records to show when the derail, stand or housing were lubricated. Therefore, except for the statement of Gearhart that the handle was lubricated at the factory, there was no evidence that other parts of the derail such as the housing, stand or derail itself were lubricated.

Stover called Hockaday, a retired CSX maintenance-of-way worker, to give opinion testimony as to why the derail did not operate properly. A properly operating derail would not hang. The

Court ruled that Hockaday was qualified to give opinion testimony. Hockaday was familiar with the derail that Stover was operating when he was injured. According to Hockaday, the derail consisted of three parts, the derail which is placed on top of the rail, the housing where the derail goes when it is off the track and a stand you manually operate. The custom and practice of railroads was to have an inspector throw the derail monthly and make inspections to see if the derail was properly lubricated and operated properly. Derails had to be maintained and lubricated on a regular basis. Hockaday was of the opinion that Norfolk and Western did not comply with the standard of maintaining derails since Norfolk and Western would only lubricate derails when there had been a complaint or on an "as needed" basis. Hockaday

explained that there were a number of areas for the derail to be lubricated besides the stand. Notches inside the housing, the derail itself, pins, bottom bearings, and the slide and staff coming through the stand all should be lubricated. Hockaday was of the opinion that the derail was not properly lubricated because of his experience, training, the testimony of Stover, the photographs, and the testimony of Gearhart who had stated in a deposition that the derail, except for the handle had not been lubricated. According to Hockaday, derails without proper lubrication would rust or have a galling effect with metal binding on metal which would cause the derail to be hard to throw until operation broke the binding. Hockaday was of the opinion that a properly maintained derail would not hang

up and that poor lubrication was the cause for the derail operated by Stover to hang up.

McCracken, an official of Norfolk and Western whose overall responsibility was to maintain derails in the Rocky Mount area where Stover was injured, agreed with Hockaday that the derail should be lubricated to make sure there is no galling of metal and friction of metal rubbing against metal. McCracken explained there were a number of areas in the derail where metal rubbed against metal and lubrication was necessary. McCracken concurred with Hockaday that a lack of lubrication would cause a derail to hang up.

Norfolk and Western's officials agreed with Hockaday that other causes for the derail to hang up or to operate improperly such as improper adjustment or

damage were not present.

ARGUMENT

This Court has always liberally construed FELA to further Congress' remedial goal. See Conrail v. Gottshall, 114 S.Ct. 2396, 129 L.E.2d 427 (1994). However, the Supreme Court of Virginia has not followed this construction and has made rulings in Stover that are contrary to the decisions of this Court and other federal courts.

For example, in reviewing the weight to be given the expert testimony of Stover's witness, Hockaday, the Supreme Court of Virginia held:

> Indeed, although it is within the jury's province to determine whether to accept an expert's testimony, the plaintiff must introduce evidence supporting a reasonable inference that the alleged defect was the "probable" cause of the

> accident as distinguished from a "possible" cause among other possibilities: . . . (*emphasis added*).

See Stover v. Norfolk and Western Railway Co, 249 Va. 192 at 200 (1995). (App. 56). The Supreme Court of Virginia adopted the wrong standard as established by this Court and other federal and state courts. Stover does not have to prove common-law proximate causation, but only that his injury resulted "in whole or in part from the railroad's violation of the Act. 45 U.S.C. §51." See Crane v. Cedar Rapids and J.C.R. Co., 395 U.S. 164 at 166, 89 S.Ct. 1706, 23 L.E.2d 176 (1969). See Tyree v. New York Central R. Co., 382 F.2d 524 at 529 (6th Cir. 1967) cert. denied 389 U.S. 1014 88 S.Ct. 589 19 L.E.2d 59 (1967). See Page v. St. Louis Southwestern Ry. Co., 312 F.2d 84, 87 (5th Cir. 1963). See Hausrath v. New

York Central R. Co., 401 F.2d 634 (6th Cir. 1968). The Supreme Court of Virginia held Stover's expert to an incorrect burden, [a standard used in a product liability act (Calhoun v. Honda Motor Co.), 738 F.2d 126, 133 (6th Cir. 1984),] and did not follow the well established standard set by this Court in the Rogers case.

> Under this statute, the test of a jury case is simply whether the proof justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the

> injury or death. Judges are to fix their sights primarily to make that appraisal and if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

See Rogers v. Missouri-Pacific, 352 U.S. 500 at 506, 507, 77 S.Ct. 443, 1 L.Ed 2d 493 (1957). This Court has again recently repeated this standard. Conrail v. Gottshall, 114 S.Ct. 2396, 129, L.E.2d 427 (1994).

After making an incorrect statement of the law, the Supreme Court of Virginia then reviewed the evidence on what Stover's expert had a right to rely on, and could not ignore the fact that Stover's expert, Hockaday, had a right to rely on the track supervisor's statement that the derail was old, still in place

and had not been lubricated (App. 60). When the Supreme Court concluded that it could not exclude Hockaday's testimony, the Court said "even assuming the deposition testimony permits the expert to conclude that improper lubrication on critical internal parts of the device caused the injury, it does not furnish any support for the proposition that such condition was foreseeably dangerous" (App. 60).

The Court then denied Stover recovery because Stover had not proved foreseeability of harm. Stover does not deny that foreseeability of harm is a part of his burden, but the Supreme Court of Virginia has taken unduly restrictive view of foreseeability as defined by the case law from this Court and other federal courts.

Stover admits that he could not

prove prior complaints about the particular derail functioning improperly before Stover was injured, but this does not bar Stover's recovery. In Gallick, the plaintiff was working on a road bed where there was a pool of stagnant water with dead and decayed rats and pigeons. Insects had been seen in the pool and there was evidence that the railroad was aware of this condition. The railroad employee, while working near the pool, experienced a bite in his left leg by a large insect which later became infected and eventually required the amputation of both legs. The employee received a verdict and the court of appeals took it away. The appellate court held that there was no direct evidence that the insect had any connection with the pool or had become infected from the pool and that there were other possibilities where

the insect could have come from or had become infected from. The Supreme Court of the United States, however, held that the appellate court improperly invaded the function and province of the jury and it reinstated the verdict. In Gallick, there was no evidence that any employee had ever been bitten before. The Court stated that the argument that even though there had been no similar incidents in the past and the railroad had no specific reason for anticipating a mishap or injury, was "a far too narrow a concept of foreseeable harm to negate negligence under the Federal Employers' Liability Act. Gallick v. Baltimore/Ohio R. Co., 372 U.S. 108 at 118, 83 S.Ct. 659, 9 L.E.2d 615 (1963).

Here, in Stover, it was established that the derail should be lubricated to avoid galling or friction of metal

rubbing against metal. Rust, burrs or galling could result if there was no lubrication. There was evidence that the derail was not lubricated. Even Gearhart, the supervisor responsible for maintaining this derail, stated that, other than the crank eye of the stand which was lubricated at the factory, he had no knowledge of the remainder of the derail ever being lubricated. No official of the railroad who inspected the derail after Stover's injury said that the derail was lubricated. No inspection report showed that it was lubricated. Norfolk and Western did not ever establish when the derail was lubricated other that its claim that the crank eye was lubricated at the factory which the jury had a right to disregard and which was only one part of the derail. There was evidence from both

Hockaday and McCracken that a lack of lubrication could cause a burr to build up, or rust to occur, or to have a galling effect, all of which could cause the derail to hang and cause injury to Stover. With that evidence, did Norfolk and Western know or should have known the derail could hang if it was not lubricated? The answer is yes. Norfolk and Western had notice of this condition. There was evidence that Norfolk and Western did not maintain or lubricate it derails until complaints were made and that was a poor practice and not the custom in the industry. Therefore, there was evidence that a condition existed, namely, the lack of lubrication of a derail, that the condition existed for some time, and that it could cause a derail to hang. There is no difference in facts in the Gallick case and the

facts here. In Gallick, an insect had never bitten an employee before, and it was possible that the insect had come from sources other than the stagnant pool or had been infected from sources other than the stagnant pool.

The Virginia Supreme Court's language, at the conclusion of its opinion, that it was incumbent upon Stover to show that Norfolk and Western knew or should have known of a defect in a device is not a proper statement of the law of foreseeability under FELA. It was incumbent upon Stover to prove the existence of a condition, that is improper maintenance and the lack of lubrication of an appliance, which a reasonable person knew or should have known could result in an injury to an employee. There was evidence to support the jury's conclusion that the derail was

not lubricated or properly maintained and that this failure to lubricate or maintain caused the derail to hang causing Stover's injury.

Stover did not have to prove notice of a defect, but met his burden of foreseeability by showing the existence of a condition, i.e., lack of lubrication and maintenance of the derail that could cause a derail to hang up or not function properly which Norfolk and Western knew or should have known of. A number of cases have rejected the restrictive view of foreseeability taken by the Virginia Supreme Court. See Syverson v. Consolidated Rail Corp., 19 F.3d 824 (2nd Cir. 1994). See Gallose v. Long Island R. Co., 878 F.2d 80 (2nd Cir. 1989) where the 2nd Circuit held that the plaintiff did not have to prove that a dog had vicious propensities and met her burden

of proof by presenting evidence that the railroad knew or should have known that a large dog was on the premises and whether a reasonable employer should investigate further or take steps to inform and protect its employees. The Courts have adopted a broad interpretation of foreseeability of harm. See Hines v. Consolidated Rail Corp., 926 F.2d 262 (3rd Cir. 1991). A railroad has liability under FELA if it knew or should have known of a risk or danger. See Patterson v. Norfolk and Western Railway Company, 489 F.2d 203 (6th Cir. 1973).

Finally, the Supreme Court of Virginia ignores the standard of what constitutes a jury issue in a FELA claim. This Court has zealously protected the rights of a railroad employee to have a jury pass on issues of negligence and causation under the Federal Employers'

Liability Act.

> In passing upon whether there is sufficient evidence to submit an issue to the jury, we need only to look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

See Webb v. Illinois Central Railroad Company, 352 U.S. 512, 77 S.Ct. 451, 1 L.E.2d 503 (1957). The sufficiency of the evidence in a FELA claim in a state court action is a federal question reviewable by the Supreme Court of the United States. See Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.E. 239 (1943). The Court should only take away a jury verdict "when the evidence is such without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." See Brady at 320 U.S. at 479.

The Federal Employers' Liability Act

was passed because Congress was dissatisfied with the common-law duty of the master to his servant.

> The employer is stripped of his common-law defenses and for practical purposes, the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial from which the jury may with reason make that inference.

See Rogers v. Missouri-Pacific R. Co., 352 U.S. 500, 507, 508, 77 S.Ct. 443, 1 L.E.2d 493 (1957).

> The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are

more reasonable.

See Tenant v. Peoria & P.U.R.Co., 321 U.S. 29 at 35, 64 S.Ct. 409, 88 L.E. 520 (1944). The Supreme Court of Virginia did not follow this standard of recovery when it affirmed the decision of the trial court.

CONCLUSION

The Supreme Court of Virginia's requirement of proving the proximate cause is contrary to all case law and the Federal Employers' Liability Act. The Supreme Court of Virginia's decision denying recovery because Stover failed to prove foreseeability of harm is contrary to the broad interpretation of foreseeability established by this Court and other Federal courts.

This Court should grant a writ of certiorari to the Supreme Court of Virginia because the Supreme Court of

Virginia erred when it affirmed the trial court's decision setting aside a jury verdict awarding Stover five hundred thousand dollars ($500,000.00) since there was sufficient evidence to support Stover's verdict as shown by well established precedent in this Court and other federal and state courts.

Respectfully submitted,

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VIRGINIA: IN THE CIRCUIT COURT OF ROANOKE
Joseph M. Stover
v.
Norfolk and Western Railway Company

JURY VERDICT

THE CLERK: We the jury on the issues joined unanimously find our verdict in favor of the Plaintiff, Joseph Marvin Stover, and fix his damages at $500,000.

May 13, 1993

ORDER OF TRIAL COURT
ENTERED JUNE 10, 1993

VIRGINIA: IN THE CIRCUIT COURT OF ROANOKE
Joseph M. Stover
v.
Norfolk and Western Railway Company

ORDER

This matter came to be heard on May 10, 1993. Thereupon came the plaintiff, Joseph M. Stover, in person and by counsel, and the defendant, Norfolk and Western Railway Company, by authorized

representative and by counsel, and also came a jury, to-wit: Lisa A. Cowan, Hope L. Green, Janet M. Grisso, James M. Lesniak, James J. Stover, Mary I. Tucker, and Loletta Whiteside, who were duly selected according to law and sworn to well and truly try the issue joined and a true verdict render according to the evidence and the law.

The matter was heard and tried on May 10, 11, 12 and 13, 1993.

The evidence of plaintiff was presented, following which plaintiff rested. Thereafter, the defendant, by counsel, moved to strike the plaintiff's evidence as being legally insufficient to support a verdict for plaintiff against the defendant, which motions were argued by counsel. The Court took under advisement the defendant's motion to strike the evidence as to future lost

earnings capacity and overruled the remainder of defendant's motions to which rulings defendant's objections are noted.

The evidence of defendant was presented, following which defendant rested. Thereafter, the defendant, by counsel, renewed its motions to strike plaintiff's evidence. After consideration of the evidence and arguments of counsel, the Court overruled defendant's motions to which the defendant, by counsel, duly objected.

Thereupon, out of the presence of the jury, the Court granted and denied the parties' request for jury instructions as set forth on the record. After the jury received the instructions of the Court and heard the arguments of counsel, the jury retired to the jury room to consider its verdict. After some time the jury returned into Court with

the following verdict, to-wit:

We, the jury, unanimously find our verdict in favor of the plaintiff, Joseph M. Stover, against the defendant, Norfolk and Western Railway Company, and unanimously fix his damages at $500,000.00.

/s/ Janet M. Grisso, Foreperson

The defendant moved the Court to set aside the verdict as excessive and unsupported by the evidence. The court takes under advisement that motion and declines the plaintiff's request that judgment forthwith be entered on the jury's verdict. The defendant is to provide this Court with a transcript of the proceedings and will have thirty days after receipt of the transcript in which to file its written motions and brief. The plaintiff will have thirty days

thereafter to file his response, with any subsequent reply from defendant due fourteen days after receipt of plaintiff's response. And the cause is continued.

Entered this 10th day of June, 1993.

/s/Clifford L. Weckstein
JUDGE

Seen:

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VIRGINIA: IN THE CIRCUIT COURT OF ROANOKE
Joseph M. Stover
v.
Norfolk and Western Railway Company

RULING OF TRIAL COURT SETTING ASIDE JURY VERDICT ON NOVEMBER 2, 1993

November 2, 1993

THE COURT: This is the case of Joseph Martin Stover v. Norfolk & Western Railway Company, which is Common Law Case 91-1299.

Present on this 2nd day of November, 1993, are the Plaintiff, in person, together with his attorney, Kevin Bilms, of the law firm of Moody, Strople & Kloeppel, Ltd. Present on behalf of the Defendant are Daniel S. Brown and Leslie E. Hagie of the law firm of Woods, Rogers & Hazelgrove. Counsel have orally argued the Defendant's post trial motion to set aside the verdict--the verdict of a jury--and enter judgment n.o.v., and the Defendant's alternative motions. Those

mo---those arguments were not taken down by a court reporter. Because I am going to announce my decision on the motion, I have asked that the deputy clerk of the Circuit Court and court reporter sign the court reporter's oath, and take down what I say, so that it may be included in the record in this case.

I have had the opportunity to read the excellent briefs or memoranda of law submitted on behalf of both parties. I have had the opportunity to review extensively the transcript of the trial. This case was tried in May, and comes on for argument on the post-trial motions at the beginning of November. The Defendant argued at every stage of the proceedings that I should exclude evidence or should take questions away from the jury, and in many instances we proceeded over the Defendant's objection. Our Supreme

Court, the Supreme Court of Virginia, has made it clear that only when it is conclusively apparent that the plaintiff has proven no cause of action against a defendant should the trial judge do anything other than let the jury proceed to reach a verdict. "Adherence to these settled rules," our Supreme Court said in Brown v. Koulizakis, 229 Va. 524 at 531, 331 S.E.2d 440 (1986), "Avoids the delay and expense to the parties when a plaintiff is successful on appeal and a new trial is required. If the Court overrules the motion to strike, submits the case to the jury and a plaintiff's verdict is returned, the court may set the verdict aside as being contrary to the evidence or without evidence to support it. Code Section 8.01-430. If this court reaches a different conclusion upon appeal, the record includes the

verdict and we can enter final judgment, thus ending the case." See also Higgins v. Bowdoin, 238 Va. 134, 380 S.E.2d 904 (1989).

It is a drastic measure, indeed, for a trial court, having sent a case to the jury, and having seen a jury return a substantial verdict for personal injuries, to set aside a jury's verdict. I now do so, following the Supreme Court's dictates in Brown v. Koulizakis.

I will set aside the verdict and I will enter final judgment for the defendant, so this case will go to the Supreme Court in the manner that the Brown opinion talks about. It seems, however, to me that this is not a case in which, if the Supreme Court determines that I am wrong in entering judgment for the defendant, the court can reinstate the verdict, because I am satisfied that

there is error committed by this trial judge in the damages aspect of the case as well.

Turning to the major point, Mr. Stover's testimony, of course, establishes what happened from his perspective but sheds slight, if any, light upon the negligence of the defendant railroad. I am, by the way, unpersuaded that Massie v. Firmstone has any application as the Defendant argued. Massie v. Firmstone has, of course, no application to statements of opinion or conclusion. Mr. Stover told what happened. It is Mr. Hockaday's testimony that either furnishes a factual basis for a verdict on liability, or fails to do so. I am satisfied, after review of the cold hard transcript and after careful consideration of the testimony and of the case law, that Mr. Hockaday simply fails

to furnish a bedrock of fact upon which an opinion of negligence could have been predicated. I am satisfied that Mr. Hockaday's testimony is insufficient to furnish the jury with facts upon which a verdict against the railroad could be sustained.

Counsel for the defendant cited Calhoun v. Honda Motor Co., Ltd., 738 F.2d 126 (6th Cir., 1984). In that case, the court stated, "As the court said in Polk v. Ford Motor Company, 529 F.2d 589, (8th Cir., 1976), cert. denied, 426 U.S. 907, 96 S.Ct. 2229 48 L.Ed.2d 832 (1976), there must, of course, be sufficient facts already in evidence or disclosed by the witness as a result of his investigation to take the testimony out of the realm of guesswork and speculation," citation omitted. "Although it is within the jury's

province to determine which expert to believe," and I underscore this, "plaintiff's expert's opinion as to the cause of the accident was supported by nothing more than conjecture and supposition. It was not based upon evidence which entitled it to be credited by the jury." I'll add a portion of the next paragraph. "It is incumbent on the plaintiff to introduce evidence that will support a reasonable inference that the defect was the 'probable' cause of the accident as distinguished from a 'possible' cause among other possibilities. Otherwise the jury verdict is based upon speculation and surmise."

The Defendant in the case at bar--and that's the end of that quotation--the Defendant in the case at bar argued vigorously that Mr. Hockaday should not

be permitted to testify. I ruled that the Defendant confused admissibility with weight. Mr. Hockaday, having been permitted to testify and the trial judge, I, having scrutinized Mr. Hockaday's testimony, taking that testimony in the light most favorable to Mr. Stover and giving Mr. Stover the benefit of all inferences fairly to be drawn from Mr. Hockaday's testimony, must conclude that it is grounded in surmise and conjecture rather than in objective fact.

If we were in the realm of the jury deciding whether to accept or to disregard particular conclusions to be drawn from solid fact, we would be within the realm of jury questions. Though I submitted this case to the jury, I am now satisfied that the Supreme Court would not affirm a verdict based on Mr. Hockaday's testimony, and more to the

point, I am satisfied that the case should not go to the Supreme Court with the plaintiff armed with a jury verdict that the trial judge has approved.

Mr. Hockaday's testimony is indeed cobbled together based upon layers of surmise, conjecture and inference. I have scrutinized the record to see whether I believe the testimony of everybody else, taken together with Mr. Hockaday, or without Mr. Hockaday would support a liability verdict. The answer, unfortunately for Mr. Stover, is no.

Passing quickly on to other issues, if I did not set this verdict aside based upon the liability determination, I would based upon damages. Having now the luxury of time, I conclude that it was a mistake to give the jury simply an instruction that said "reduce to present value." I conclude that evidence to

permit the jury to make a reasoned and intelligent calculation is necessary. In the Casale case pending before the Supreme Court, the Supreme Court may not reach that issue; clearly does not have to reach that issue. If the Supreme Court reaches that issue, the Supreme Court of Virginia, I believe the Supreme Court will come to that conclusion. On that basis alone, the verdict would have to be set aside.

Second on damages, and I think this is a close question, my perception during the trial of the case was that the evidence fairly was balanced, the jury was told--fairly was balanced on the issue of Mr. Stover's discharge---but the jury was told that Mr. Stover's discharge played no part, and that Plaintiff having produced such evidence as the Plaintiff produced, any prejudice to the Defendant

was alleviated by the jury being told again that Mr. Stover's discharge played no part, and second, that Mr. Stover's discharge was for a cause unrelated to the incident which furnished the basis for the motion for judgment. And I am being candid, that was my impression at trial. That's not my impression when I read the transcript. And I'm not sure that a trial judge ought to place as much weight on the transcript as on what he saw and heard and sat through. At the point during the trial at which Mr. Brown stood up and said it would be very unfair to the railroad to exclude evidence concerning Mr. Stover's safety record, I was unimpressed. I was also not recalling the beginning of Mr. Stover's testimony. Mr. Bilms accurately notes that the Defendant places a lot of emphasis on a few sentences at the

beginning of the testimony. Those are important sentences; that is an important preface to whatever went after.

Mr. Stover's testimony begins slightly below the bottom of page 103 of the first testimony of the trial--or the first volume of the trial transcript which is the second transcript volume. I believe it is the sixth question, page 104, "Q. Following that injury were you contacted by the railroad?"

"A. Yes, sir."

"Q. Did they hold an investigation?"

"A. Yes, sir."

"Q. And what happened?"

"A. They fired me."

"Q. The Defense lawyer made reference to the fact that you got fired in 1980."

"A. Yes, sir."

"Q. For what?"

"A. I was an alcoholic and they caught me drinking and fired me for drinking."

Question and answer dealing with the rehabilitation program and ended with "They put me back to work," and he was hired back moving on from there.

The onset of the Plaintiff's case, "We are here today on your lawsuit about your accident in September of 1990. Following that injury you were contacted by the railroad. They held an investigation. What happened?" "I was fired."

I now conclude that the Defendant, not having objected to that testimony, was entitled to walk through the door that Mr. Stover opened. The jury having been told by the Plaintiff at the outset that what the railroad did to him following that injury was fire him, the

Defendant was entitled to introduce more evidence than the trial judge allowed the defendant to introduce.

I, again on review of the cold record, am concerned that error was committed in the tax return evidence for the reasons stated by the Defendant, and that--I'm sorry, I'm looking for a witness' name. The gentlemen who testified to jobs available in the national economy.

MR. BILMS: Mr. Bates, Your Honor.

THE COURT: Thank you. Mr. Bates' testimony was such as to permit speculation and conjecture well beyond that which the Virginia Supreme Court would allow based upon Bulala v. Boyd, 239 Va. 218, 389 S.E.2d 670 (1990), and GRTC v. Wilkerson, 242 Va. 65, 406 S.E.2d 28 (1991).

As I said, and I think it's time for

me to stop talking, it is a very difficult thing indeed for a trial judge to set aside a verdict rendered by a properly instructed jury after several days of testimony, especially when that verdict is in a very significant amount for a man who, according to the testimony he presented, has suffered from and will continue to suffer from significant injuries, physical and emotional. The trial judge is indeed the gate keeper, as Mr. Brown says. The trial judge's function in passing upon jury verdicts is not one lightly to be exercised. I heard a law professor give a lecture recently in which he referred to what the trial judge did after a jury's verdict's re--- jury's verdict was returned---as the "confirmation hearing." I took exception to that. One of the constitutionally mandated necessities in our Seventh

Amendment jurisprudence, in the jurisprudence under Article I of the Constitution of Virginia, is that the trial judge have superintendence over jury verdicts and assure that no erroneous verdict stands. I have exercised the function I am by law required to exercise today. I have done it in the manner in which I think the Virginia Supreme Court wants it done, which is to give the Court an entire record. The Plaintiff's objections to this ruling are preserved for all of the reasons stated by Mr. Bilms orally and in writing. Likewise, all of the Plaintiff's objections to the Court's pre-trial and trial rulings are preserved without necessity for reiteration of any of them. Similarly, all objections made by the Defendant to the Court's pre-trial and trial rulings are preserved without

necessity for reiteration, and the Defendant's objections that I didn't rule in the Defendant's favor on anything else that the Defendant cited on brief are likewise preserved.

I will now add something utterly gratuitous. One reason that is difficult to set aside this verdict is that our local newspaper, which has reporter present, wrote an article critic--wrote an editorial, excuse me, an editorial criticizing the verdict. I do not---that really does make it harder for me to make this ruling. I do not want the editorial staff of the Roanoke Times & World-News, which is totally separate from the news staff which is present today, to believe that their editorial opinions either do or ought to influence the judgment of trial judges. Since I assume counsel and Mr. Stover saw the editorial, I thought I

would make my gratuitous comment that, yes, I saw it, didn't like it. It showed an ignorance of FELA law which was as broad as it was deep. But I, nonetheless, have to set aside the verdict. Anything further today, Mr. Brown?

MR. BROWN: No, Your Honor.

THE COURT: And you'll prepare the order, please. Mr. Bilms, anything further?

MR. BILMS: Nothing further, Your Honor.

THE COURT: Thank you very much. Sheriff, we'll stand in recess.

(End of Proceedings on November 2, 1993.)

LETTER OPINION OF COURT
DECEMBER 8, 1993 CONFIRMING
RULING SETTING ASIDE VERDICT

December 8, 1993

Daniel S. Brown, Esquire
Woods, Rogers & Hazlegrove
P. O. Box 14125
Roanoke, Virginia 24038-4125

Kevin P. Bilms, Esquire
Robert A. Small, Esquire
Moody, Strople & Kloppel, Ltd.
P. O. Box 1138
Portsmouth, Virginia 23705

RE: Joseph M. Stover v.
Norfolk & Western Railway Co.
CL910001299
Circuit Court of the City of
Roanoke

Dear Counsel:

On November 17, 1993, Mr. Small and Mr. Brown argued the plaintiff's motion for reconsideration of my previous decision to set aside the jury's verdict, and enter judgment for the plaintiff. At the conclusion of that hearing, I took the motion under advisement, especially

since Mr. Brown wished to discuss with his client the possibility that the defendant might wish to concur in the plaintiff's motion, on the terms advanced by Mr. Small at the hearing.

On December 3, 1993, I received Mr. Brown's letter of December 1, informing me that the defendant opposes the plaintiff's motion.

Upon mature consideration, I deny the plaintiff's motion to reconsider, and I adhere to the opinion that the jury's verdict must be set aside, and that judgment for the defendant must be entered.

While I am sympathetic to the arguments that the plaintiff makes--and fully conscious of the magnitude of the extraordinary decision I have made--I remain of the opinion that the plaintiff, having had his day in Court, and having

presented his liability evidence as best he could, failed to adduce evidence that would support a verdict in his favor. Under such circumstances, the appropriate remedy is not a new trial, but a judgment for the defendant.

Would Mr. Brown please prepare an order reflecting the trial and its incidents, the verdict, and the post-trial motions and rulings thereon? So far as I am concerned, it is sufficient for the order to reflect that each party's objections to the trial Court's rulings are fully preserved for all of the reasons set forth on the record. I leave to counsel the question of whether you believe it is necessary to further set out your objections at the foot of, or in the body of, the final order.

I look forward to receiving this order, duly-endorsed, as soon as

possible, so that you can turn your sights to the appellate phase of this case.

I send best regards.

Very truly yours,

/s/Clifford R. Weckstein

CRW/ddh

FINAL JUDGMENT ORDER
ENTERED FEBRUARY 1, 1994

VIRGINIA: IN THE CIRCUIT COURT OF ROANOKE
Joseph M. Stover
v.
Norfolk and Western Railway Company

FINAL JUDGMENT ORDER

On November 2, 1993, counsel for both parties presented oral argument on defendant's post trial motions. Having heard the arguments, and having reviewed the trial transcript and read the detailed briefs submitted by both parties, for the reasons set forth by the

Court orally, transcribed and hereby made a part of the record, it is ORDERED AND ADJUDGED:

The verdict rendered by the jury is set aside, and final judgment is entered in favor of the defendant; the Court further expressed on the record the opinion that, were the Supreme Court of Virginia to determine that final judgment for the defendant is improper then, for the reasons expressed orally on November 2, 1993, the Supreme Court will not simply reinstate the verdict, because of error in the admission and exclusion of evidence at trial.

Plaintiff's objections to this ruling, and all other objections made during the trial and pre-trial proceedings, both orally and in writing, are preserved without the need for reiteration. Likewise, all objections of

the defendant, to the extent they are not addressed by the Court's ruling, are preserved.

On November 15, 1993, plaintiff filed a Motion for Reconsideration of Entry of Judgment on Behalf of Defendant and to Set Aside the Verdict on Behalf of Defendant and to Direct a New Trial. Oral arguments were heard before this Court on November 17, 1993. Having heard counsels' arguments, this Court remains of the opinion, as set forth in the Court's letter opinion dated December 8, 1993, that the ruling of November 2, 1993, was correct. Accordingly, plaintiff's motion for reconsideration and for a new trial is denied.

Nothing further remaining to be done in this cause, it is hereby dismissed from the docket of this Court. The Clerk shall certify a copy of the final

judgment order to Kevin P. Bilms, Esq., and Robert A. Small, Esq., MOODY, STROPLE & KLOEPPEL, LTD., 500 Crawford Street, P. O. Box 1138, Portsmouth, VA 23705-1138, Counsel for Plaintiff, and to Daniel S. Brown and Leslie E. Hagie, WOODS, ROGERS & HAZLEGROVE, First Union Tower, Suite 1400, 10 South Jefferson Street, Post Office Box 14125, Roanoke, Virginia 24038-4125, Counsel for Defendant.

Entered on this 1st day of February, 1994.

/s/Clifford L. Weckstein

M#187120

Seen:

/s/Daniel S. Brown
Daniel S. Brown, Esq.
Leslie E. Hagie, Esq.
WOODS, ROGERS & HAZLEGROVE
First Union Tower, Suite 1400
10 South Jefferson Street
Post Office Box 14125
Roanoke, Virginia 24038-4125
Counsel for Defendant

Seen and objected to:

/s/Kevin P. Bilms

Kevin P. Bilms, Esq.
Robert A. Small, Esq.
MOODY, STROPLE & KLOEPPEL, LTD.
500 Crawford Street
P. O. Box 11380
Portsmouth, VA 23705-1138
Counsel for Plaintiff

STOVER'S ASSIGNMENTS OF ERROR

1. The Court erred in setting aside the jury verdict and entering final judgment in favor of Norfolk & Western as there was sufficient evidence for reasonable people to conclude under the proof required by FELA that Norfolk & Western was negligent.

2. The Court erred in holding that Hockaday's testimony was not sufficient to present a jury issue as Hockaday was qualified and his

opinion evidence was properly based on uncontradicted facts in evidence.

3. The Court should have ordered a new trial for Stover instead of entering final judgment for Norfolk and Western.

SUPREME COURT OF VIRGINIA
GRANTING STOVER'S PETITION FOR APPEAL

VIRGINIA: *In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Tuesday *the* 2nd *day of* August, 1994.

Joseph M. Stover, Appellant,

against Record No. 940659
Circuit Court No. CL91-1299

Norfolk and Western
Railway Co., Appellee.

From the Circuit Court of
the City of Roanoke

Upon the petition of Joseph M. Stover an appeal is awarded him from a judgment rendered by the Circuit Court of

the City of Roanoke on the 1st day of February, 1994 in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Norfolk and Western Railway Company was defendant; upon the petitioner, or some one for him, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the said court below in the penalty of $500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

On further consideration whereof, this appeal is also awarded to the appellee's assignments of cross-error.

A Copy.
Teste:
David B. Beach, Clerk
By: /s/Patricia A. Krueg
Deputy Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B.

Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on August 2, 1994 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 3rd day of August, 1994.

David B. Beach, Clerk
By: /s/Patricia A. Krueg
Deputy Clerk

SUPREME COURT OF VIRGINIA
ORDER AFFIRMING TRIAL COURT'S DECISION

VIRGINIA: *In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Friday *the* 3rd *day of* March, 1995.

Joseph M. Stover, Appellant,

against Record No. 940659
Circuit Court No. CL91-1299

Norfolk and Western
Railway Co., Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Roanoke on the 1st day of February, 1994.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the appellee thirty dollars damages.

This order shall be certified to the said circuit court.

A Copy,
Teste:
/s/David B. Beach
Clerk

WRITTEN OPINION OF THE
SUPREME COURT OF VIRGINIA

Stover v. Norfolk and Western Rwy. Co.
249 Va. 192 (1995)

JUSTICE COMPTON delivered the opinion of the Court.

On September 11, 1990, plaintiff Joseph M. Stover was working for his employer, defendant Norfolk and Western Railway Company, as member of a train crew when he was injured while operating a safety device affixed to a railroad track near Rocky Mount, Virginia. The plaintiff filed the present action against defendant under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, seeking recovery in damages for his injuries. The plaintiff alleged the injuries resulted from defendant's negligence in failing to properly inspect and maintain the device.

During a four-day trial by jury, the court below denied defendant's motions to strike the plaintiff's evidence made at the conclusion of the plaintiff's case-in-chief and at the conclusion of all the evidence. The case was submitted to the

jury on issues of primary negligence, contributory negligence, proximate cause, and damages. The jury found in favor of the plaintiff and fixed his damages at $500,000.

The defendant filed a motion to set the verdict aside, and the court asked that the trial transcript be prepared. Upon review of the transcript, and upon consideration of argument of counsel, the court granted defendant's motion. We awarded the plaintiff an appeal from the February 1994 order entering judgment for the defendant.

Although numerous questions raised by the assignments of error and cross-error have been debated, one issue is dispositive of the appeal, *viz.*, whether the trial court erred in setting the verdict aside upon the ground that the plaintiff failed to prove defendant's

primary negligence.

[1] When the verdict of a jury has been set aside by the trial court, the verdict is not entitled to the same weight upon appellate review as one that has received the trial court's approval. Nonetheless, when considering the facts under these circumstances, the appellate court will grant the party prevailing before the jury benefit of all reasonable inferences that may be drawn from the evidence and of all substantial conflicts in the evidence. *Kelly v. Virginia Elec. and Power Co.*, 238 Va. 32, 34, 381 S.E.2d 219, 220 (1989). We shall relate the facts in accord with these settled rules.

On the day of the accident, plaintiff, age 49, was employed by defendant as a brakeman in a four-man crew that included an engineer, a conductor, and another brakeman. He "was

working the local" that travelled from Roanoke to Winston-Salem, North Carolina, switching, transferring, and picking up railroad cars at private sidings.

About 1:30 p.m., the train approached a spur track near "MW Distributors" at Rocky Mount to leave a car there. Plaintiff alighted from the train, and unlocked a switch allowing the engine and cars to travel from the main track onto the spur. He then walked a short distance along the spur to operate the device in question so that the units could roll farther into the siding.

The device, hand-operated and made or iron, is designated to prevent railroad cars from entering a main line from a side track. When the device is "on," a 90-pound portion, called the "derail," rests on top of one rail causing cars that may be rolling on a

side track to "derail themselves off into the ground."

The device has three components: a housing, the derail, and an operating stand "with a handle on it." The housing lies between and below the top of the rails, adjacent to one rail; it is affixed to parallel cross-ties that are perpendicular to the track and that rest on roadbed ballast. The operating stand is affixed to the same ties on the opposite side of the rail.

In order to operate the device, an individual must stand beside the track and remove a lock securing the handle. According to a written railroad rule that provides "how the trainman, brakeman or whoever, is supposed to operate" the device, the person should face the device, "and with knees bent, grasp operating handle with both hands; lift

and move handle." Testimony revealed that the tip of the operating stand handle (lever) must be lifted about six inches "into an up position to free the locking mechanism"; when the lever is fully lifted, there is a clearance from the locking mechanism of between 1/4 and 3/8 of an inch. Then, in order to "throw the derail, you move the handle to your right when facing the derail, and it should move in the neighborhood of two feet." If the lever is not lifted at least four inches, the locking mechanism will not be cleared, and the lever is prevented from moving to the right to operate the derail.

The operating stand is designed to give a five to one mechanical advantage when manipulating the derail. Thus, "the amount of force in pounds would be one-fifth the weight of the derail plus

possibly a small amount for any friction that might be in the metal surfaces that operate against each other." In other words, approximately 18 pounds of force is needed to move the derail from its position on the rail down into the "off" position in the housing, which guides "the derail up and off the rail to below track level" in response to the horizontal, left-to-right movement of the handle.

The plaintiff, who had worked for railroads for approximately 25 years and who operated the "derails" in the Rocky Mount area on "a daily basis," testified that the accident happened in the following manner; he was the only eyewitness to the incident. Plaintiff said, "I lined the switch and went down and took the lock out, laid it down and went to throw the derail. I pulled up on

it and was trying to move it from left to right and it hung." Plaintiff continued, "I reached back to give it another jerk and added more pressure. When I did, it just flopped. I felt a sting in my neck. I didn't think too much about it at the time, went on working." Plaintiff had successfully taken the derail "off," and it was put back "on" by the other brakeman in the normal course of his duties with "no problem." Shortly after the incident, numbness developed in plaintiff's arm and hand, and he reported the incident to the engineer shortly after the train departed Rocky Mount.

Plaintiff testified he "never" had one of "these levers hang" on him prior to this incident. He stated that he "had no idea what caused it to hang up" and that it could have been a "burr on the metal that broke loose."

Plaintiff was asked whether he had raised the handle high enough to free it of the groove in the locking mechanism. He responded, "That is exactly right" to a prior statement he made as follows: "'But I thought I had it all the way. I might not have had it up all the way. I do not know, and all I know is it hung.'" He agreed that the handle must be raised "all the way up before it unlatches."

The plaintiff contended that the device had not been properly maintained by defendant. Specifically, he sought to prove negligent failure to lubricate the device.

Plaintiff testified that on the day of the accident he examined the device after he "tried to throw it" and saw no lubrication "whatsoever." He stated that he had complained to defendant's supervisory personnel on "a number of

occasions" and asked that "switches and derails" be lubricated or serviced. He said that during his years of working on the track in the Rocky Mount area, defendant customarily refused to lubricate "it switches and derails" until there was a complaint of malfunction. He stated, however, that prior to the date of the accident, he had not made any complaint or report about lack of lubrication or operation of the particular derail allegedly causing his injury. The evidence showed that lubrication has "nothing to do with that process of how high" an operator must lift the lever in order to activate the derail.

Over defendant's objection, the trial court permitted George Louis Hockaday to testify for the plaintiff as an expert witness. Hockaday is a cattle

farmer from Providence Forge, Virginia, and supplements his income by "doing consulting work" for the plaintiff's attorneys. Hockaday, who worked for the C & O Railroad from 1957 to 1977, is retired from a railroad union organization. He was offered by the plaintiff as an expert in maintenance of railroad tracks and "track-related appliances," including switches and "derails." As a part of his duties with the C & O, he had been responsible for determining whether "derails" were installed and maintained properly. His last railroad employment had been "over 14 years" before trial, and he had last installed a "derail" more than 20 years before trial. Often during his testimony, the witness used the generic term "derail" to refer to the whole, three-component device.

The expert's opinions were based on review of depositions of one of defendant's trainmasters and one of its track supervisors as well as color photographs of the exterior of the device in question. The witness had not talked with the plaintiff, although he reviewed plaintiff's deposition after he had formed his opinions. He had not been to the site of the accident, had never seen the device in question, and hence had never operated it.

Hockaday testified that railroads are required by federal regulations to inspect any "derail" monthly "to see whether it had lost motion in the pins, to see if it was properly lubricated, and see if it operated properly." He said there was no "requirement that the derails be lubricated on any sort of regular basis," but that they "have to be

thrown on a monthly basis." The witness opined that poorly lubricated "derails" will "hang up" because when "you take two pieces of iron that are placed together and they are exposed to the elements they are going to rust, freeze, or gaud up if they are not used."

The expert said that when "you are throwing a derail to get it off the track you have to raise it up out of a notch," which is inside the housing. He stated that according to custom and practice in railroad maintenance, the notch "is supposed to be lubricated with grease or oil or . . . graphite." He said there are no springs, rollers, or bearings that operate with the lever to lift the derail from the track; a connecting rod "goes from the stand, pushes against the derail itself in the middle, and that in turn forces it up over that notch by sheer

strength and when it gets up to that point then it dips." Hockaday referred to other parts of the device, such as bearings and "pins" that required lubrication; he said that the photographs did not "show any indication whatsoever that there has been any lubrication put on the pins themselves" and that the track supervisor stated in his deposition that "he did not lubricate it."

The witness said that failure to lubricate "derails" until "somebody called in a complaint" is poor "railroad practice" because when they are not maintained on a regular basis "they do get hard to throw and they are subject to cause injury." Referred to testimony that the device in question was tested and "thrown" numerous times by defendant's employees immediately after the accident and that no "problem" was

experienced "either getting it off or getting it back on," Hockaday said that such circumstance did not "surprise" him. He opined that once "you break it loose" from rust or a "rough place," the more frequently the device is thrown "the easier it gets."

During cross-examination, the expert agreed that, in order to determine the presence of lubrication within the device, the lever must be moved "halfway over to cock that derail up off the rail" so that it can be examined from the side, and that the photographs give no "indication at all whether or not that derail inside the housing has been lubricated." Recognizing that the lever in question was new, the witness did not know whether it came from the manufacturer prelubricated.

The defendant proved that the

operating stand component of the device in question had been replaced and a new stand installed during the month before the accident. This stand had been "prelubricated at the factory" on an "eyebolt" or "crankeye" located on the stand's bottom prior to painting. No other surfaces on the stand are lubricated, and the manufacturer does not recommend such lubrication. This lubrication is "difficult" to observe from the photographs, according to defendant's proof.

Defendant showed it customarily lubricated the derail components "as needed" when notified of a "problem" either by train crew or inspectors. Siding tracks are inspected every 30 days. No reports of any malfunction of the device in question had been received by defendant before plaintiff's accident.

During the late afternoon of the day of the accident and after having talked with the plaintiff, defendant's employees inspected the device and operated it; the device functioned "[e]xtremely easily" and without difficulty. Four trainmen "threw it" 25 times each and "it did not at any time hang up or have any problems." Two days later, two of defendant's employees examined the device again, "and still nothing was found wrong with it." No lubrication was applied to the device either immediately after the accident or within 30 days thereafter. During the 30-day period, the device was operated without difficulty numerous times by defendant's employees.

On appeal, plaintiff contends that the trial court erred in setting aside the jury's verdict as "reasonable people could conclude from the evidence and

inferences from the evidence that Stover properly operated the derail, that the derail hung up because of lack of lubrication by Norfolk & Western and that Stover was injured as a result." We do not agree.

[2-3] "What constitutes negligence for purposes of the FELA is a federal question, and federal decisional law formulating and applying the doctrine governs in cases in states courts." *Norfolk and Western Ry. v. Hodges*, 248 Va. 254, 260, 448 S.E.2d 592, 595 (1994). "Under the FELA, a plaintiff's proof must 'justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506 (1957). Even though that question ordinarily should be

decided by a jury, in rare cases "where fair-minded persons cannot differ on whether the employer was at fault and whether the fault played any part in the employee's injury or death, the question becomes one for the court." *Id.* This is such a case.

[4] Even under the FELA, an employee still has to prove that the employer was guilty of some act of negligence in order to recover. *Norfolk and Western Ry. v. Hughes,* 247 Va. 113, 116, 439 S.E.2d 411, 413, *cert. denied,* _____ U.S. _____, 114 S. Ct. 2136 (1994). The essence of the plaintiff's testimony is that, as he was lifting the lever to clear the locking mechanism, it "hung" causing him to use additional force to accomplish the horizontal movement of the lever. He said that he "had no idea what caused it to hang up." With candor, the plaintiff

states on brief that without Hockaday's "expert testimony, a jury would have no basis for determining the cause of Mr. Stover's injury."

[5] Thus, keeping in mind settled evidentiary principles, we must analyze the expert's testimony to determine whether the trial court correctly concluded that it "simply fails to furnish a bedrock of fact upon which an opinion of negligence could have been predicated," and it "is indeed cobbled together based upon layers of surmise, conjecture and inference."

[6-8] Opinions of expert witnesses must be based either upon facts within the expert's own knowledge or upon facts established by other evidence in the case; other, the opinions are speculative and posses no evidential value. *See Gilbert v. Summers*, 240 Va. 155, 160, 393

S.E.2d 213, 215 (1990). Such statements violate the fundamental rule that an inference cannot be based upon an inference; a verdict resting upon such foundation is merely the fruit of conjecture, and cannot be sustained. *Virginian Ry. v. Andrews*, 118 Va. 482, 489, 87 S.E. 577, 580 (1916). Indeed, although it is within the jury's province to determine whether to accept an expert's testimony, the plaintiff must introduce evidence supporting a reasonable inference that the alleged defect was the "probable" cause of the accident as distinguished from a "possible" cause among other possibilities; otherwise, the verdict is based upon surmise, speculation, and conjecture. *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 133 (6th Cir. 1984).

[9-10] Under the FELA, the weight of

the evidence must be more than a scintilla before the case may be properly left to the discretion of the jury. *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943). If, without weighing the credibility of the witnesses, the evidence supports "but one reasonable conclusion as to the verdict," the court should decide the matter, thus saving the result "from the mischance of speculation over legally unfounded claims." *Id.* at 479-80.

Given the plaintiff's testimony that he had operated the device in question on "a daily basis" during the weeks before the incident without experiencing "any problem," he sought to establish through Hockaday that defendant's failure to lubricate the device caused it to "hang up." But the expert, who had general "experience in installing and maintaining

derails and as a track inspector" of derails, relied on only two sources to reach conclusions about this particular device: a group of five photographs taken two months after the incident and the deposition of defendant's track supervisor (the expert said that the only portion of the trainmaster's deposition to which he "paid attention" was the statement that the plaintiff "got hurt from the derail because of it hanging up").

[11] The photographs of the exterior of the device do not show critical portions of the apparatus. Hockaday agreed that the photos "don't give you any indication at all whether or not that derail inside the housing has been lubricated." He agreed that the "only thing you know about from these pictures are the newly installed portions, the

handle, and the connecting mechanism there." He based his assumption that the stand was not lubricated on the fact that he could not see lubrication in the photos, while the uncontradicted evidence established that the part arrived from the manufacturer prelubricated, a fact upon which he admitted he had no knowledge. In sum, he inferred that the working portion of the device had not been properly lubricated from the absence of visible lubrication on the exterior of the stand; this was an impermissible inference.

Furthermore, the deposition, not offered as an exhibit in the case, furnishes no support for the conclusion he expressed that lack of proper lubrication caused this particular device to "hang up." To buttress his testimony, he made the expansive assertion that "99

percent of the time" derails malfunction because of "poor maintenance or lubrication." The "significant" part of the deposition, according to Hockaday, was the track supervisor's statement that the derail was "old" and "still in place," and it had not been lubricated.

[12-14] Even assuming the deposition testimony permits the expert to conclude that improper lubrication on critical internal parts of the device caused the injury, it does not furnish any support for the proposition that such condition was foreseeably dangerous. Reasonable foreseeability of harm is an essential ingredient of FELA negligence. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 117 (1963). Nothing in Hockaday's testimony indicates that defendant knew, or should have known, of any defect or malfunction in this particular device.

Indeed, all the evidence shows defendant had no notice; the device was regularly inspected, no complaints were registered prior to the accident about its performance, and it functioned properly during the weeks before and after the incident. It was incumbent on the plaintiff to show that defendant, with the exercise of reasonable care, could have discovered a defect in the device and remedied the situation. *Brown v. CSX Transp. Inc.*, 18 F.3d 245, 249-50 (4th Cir. 1994). *See Hughes*, 247 Va. at 117, 439 S.E.2d at 413. This the plaintiff, with Hockaday's assistance, failed to do.

Consequently, we hold that the trial court did not err in setting aside the verdict. Thus, the judgment in favor of the defendant will be

Affirmed.

SUPREME COURT OF VIRGINIA
ORDER DENYING PETITION
FOR A REHEARING

VIRGINIA: *In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Tuesday *the* 21st *day of* April, 1995.

Joseph M. Stover, Appellant,

against Record No. 940659
Circuit Court No. CL91-1299

Norfolk and Western
Railway Co., Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 3rd day of March, 1995 and grant a rehearing thereof, the prayer of said petition is denied.

A Copy,
Teste:
/s/David B. Beach
Clerk

Supreme Court, U.S.
FILED
AUG 15 1995
OFFICE OF THE CLERK

(2)

No. 95-00164

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

JOSEPH STOVER,

Petitioner,

V.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT OF VIRGINIA, IN REVIEWING THE SUFFICIENCY OF THE EVIDENCE, PROPERLY CONCLUDED THAT PLAINTIFF FAILED TO ESTABLISH NEGLIGENCE BY HIS RAILROAD EMPLOYER?

II. WHETHER THE SUPREME COURT OF VIRGINIA PROPERLY APPLIED WELL-SETTLED PRINCIPLES OF FORESEEABILITY IN REJECTING PLAINTIFF'S NEGLIGENCE CLAIM?

III. WHETHER THE SUPREME COURT OF VIRGINIA PROPERLY DETERMINED THAT PLAINTIFF MUST INTRODUCE EVIDENCE SUPPORTING A REASONABLE INFERENCE THAT THE ALLEGED DEFECT WAS THE PROBABLE CAUSE OF HIS INJURY, AND THAT PLAINTIFF'S SUGGESTION THAT A POSSIBLE DEFECT MIGHT HAVE CAUSED HIS HARM WAS INSUFFICIENT TO REACH THE JURY?

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REPORTS OF OPINIONS BELOW

The Opinion of the trial court was not officially reported but is reported in the Appendix at pages six to twenty-seven. The Opinion of the Supreme Court of Virginia denying Stover's Petition for Appeal and Affirming the Decision of the Trial Court is reported at 249 Va. 192, 455 S.E.2d 238 (1995), and appears in the Appendix at pages thirty-five to sixty-one.

COUNTERSTATEMENT OF THE CASE

Routine application of established legal principles to the particularized facts of this case resulted in judgment as a matter of law for the Norfolk and Western Railway Company (NW). This conclusion was properly reached both by the trial court and the Supreme Court of Virginia in this action under the Federal Employers Liability Act (FELA).

Stover's Petition takes great liberties with the facts of this case. A fair review of the evidence makes abundantly clear that plaintiff failed to establish negligence. Indeed, plaintiff candidly conceded that his case would not stand without the supporting testimony of his expert Hockaday. (App. 55.)[1] Hockaday's wholly speculative testimony was properly rejected by the lower courts. This case merits no further review by this Court.[2]

---

[1]Reference to the Joint Appendix in the Supreme Court of Virginia will be by "J.A. ___." Reference to the Appendix to Stover's Petition will be by "App. ___."

[2]Following extensive briefing and oral argument the trial court set aside the jury verdict and ordered entry of judgment in favor of NW. (J.A. 24-25.) The trial court further ruled that, in the event the judgment for NW were reversed, the evidentiary flaws which prejudiced NW were such that a new trial would be necessary and that the jury's verdict could not stand under any

(continued...)

A. The Alleged Accident.

On September 11, 1990, Stover, a 49-year-old brakeman for NW, felt a twinge in his neck while operating a derail lever on a siding in Rocky Mount, Virginia. Initially, he did not notify officials, nor alert co-workers, of any equipment problem. (J.A. 178.) Later that day, however, plaintiff noticed a numbness in his left arm and reported that fact to his conductor. Plaintiff then said that the derail lever in Rocky Mount had "hung up" on him when he first attempted to operate it.

---

[2](...continued)
circumstances. (J.A. 24, 594-597.) Stover never assigned error to this latter ruling and it is now the law of the case. While Stover asks for reinstatement of the jury's verdict as the relief he seeks, such relief is unavailable given the prior unappealed rulings to the contrary.

Although a co-worker had operated the derail without incident following plaintiff's alleged incident, four NW representatives met at the derail later that afternoon and threw it over one hundred times without any difficulty. (J.A. 478-79, 507-08, 552.) The mechanism worked so flawlessly that the inspectors called NW's office to make sure they were inspecting the correct derail. (J.A. 507-08.) They were. Two days later two of these individuals returned and again each threw the derail numerous times. Again, they could find nothing wrong with the operation of the derail. (J.A. 497, 509.) During the following 30 days, no additional lubrication was applied to the derail (J.A. 487), and it continued to operate perfectly. (J.A. 531-32, 536-37.)

B. The Derail.

This derail is a simple mechanism. The unit consisted of: (1) a new Hayes stand and operating lever that had been installed the previous month (J.A. 468); (2) the 90 pound derail; and (3) the housing for the derail which attaches it to the tracks. The Hayes stand provides a 5 to 1 leverage ratio, so that it takes only 18 pounds of pressure to move the derail. (J.A. 543-44.)

Although the derail itself and its housing had been in place for several years, the operating stand was new, and had been in place for a maximum of only six weeks. Plaintiff had operated this new stand on a daily basis since its installation, and he testified that he had never experienced any previous problems with this derail, nor with any of the other derails with the newly

installed stands. (J.A. 126-128, 134.) Other witnesses concurred that there were no prior or subsequent complaints regarding this derail. (J.A. 157, 473.)

It was uncontradicted that new Hayes stands are lubricated at the factory (J.A. 470, 544), and that additional lubrication is not necessary upon installation. (J.A. 544-45.) Plaintiff, who had used this derail frequently during the six-week period prior to his injury, had never suggested to anyone that it needed lubrication (J.A. 90, 126-28, 139), although he had complained about other derails on the system.

All experts acknowledged that if there had been a lubrication problem, throwing the new derail would have become progressively more difficult over time until lubrication had been added. Here, the new mechanism never showed signs of

being difficult to throw in its daily operation for six weeks of operation prior to Stover's incident, or during the following thirty days. (J.A. 531-32.) Yet it was ultimately plaintiff's theory of the case that the derail hung up because it lacked lubrication.

C. The Unsubstantiated Assertion of Negligence.

1. Plaintiff's Testimony

Every witness who explained the operation of the derail mechanism testified that the lever utilized to take the derail off the track must first be moved vertically until it clears a "stop" before the lever may be moved horizontally to the right to actually move the derail. (Stover, J.A. 132; Hockaday, J.A. 265; Gearhart, J.A. 479-81; McCracken, J.A. 546-48.)

Stover testified that he had no idea why the derail hung up. (J.A. 140.) He stated that when he first applied pressure to the derail's lever to move it horizontally to the right, "it didn't come, it didn't give." (J.A. 72.) However, it operated normally on his second attempt (J.A. 129) after he "jerk[ed] up on it and come around with it." (J.A. 134.) Plaintiff acknowledged that he might not have raised the lever high enough the first time to release it, but stated that "I thought I had it up all the way. I might not have had it up all the way. I do not know, and all I know is it hung." (J.A. 136.) He acknowledged that when he reached back, jerked up on it and applied more pressure, "it just flopped." (J.A. 67, 134.)

2. Plaintiff's Expert Testimony

Plaintiff's expert, G.L. Hockaday, a retired union official and former track inspector for the C&O Railroad (J.A. 235, 240), had not serviced a derail since 1974. (J.A. 269.) He had never seen, let alone operated or inspected, this specific derail. (J.A. 273.) He did not know: (a) if the derail ever had been operated since its new operating stand had been installed (J.A. 273, 282); (b) if anyone prior to the plaintiff had thrown the derail on the day in question (J.A. 281-82); or (c) that Hayes stands came pre-lubricated from the factory. (J.A. 282.)

Hockaday based his entire opinion on the discovery deposition of NW's track supervisor (J.A. 272), and on five photos. Incredibly, Hockaday admitted that he did not know if the conditions

depicted in the photos were the same as existed on the day of the accident. (J.A. 267.) Moreover, he acknowledged that the photos he relied upon did not show if there was lubrication in the housing where the internal metal components operate. (J.A. 275.) He did not talk with plaintiff. (J.A. 249.) Hockaday's analysis was rooted in (1) his unstated premise that the derail had in fact malfunctioned and (2) his stated premise that 99 per cent of the time a derail malfunctions, the problem is caused by a lack of lubrication or maintenance. (J.A. 252.) Of course, Hockaday could have no knowledge of whether Stover in fact lifted the lever high enough to clear the stop on his first attempt to take the derail off the track.

3. The Lubrication Issue

Hockaday stated that the pictures taken after the incident showed no evidence of lubrication on the "derail" (meaning the operating stand).[3] He admitted, however, that those pictures gave absolutely no indication as to whether the derail itself inside the housing was lubricated. (J.A. 275.)

Yet, it is the derail itself which is critical to the operation of the derail mechanism. Hockaday simply assumed that if the pictures showed no lubrication on the operating stand, there would be none on the derail itself because he assumed that when the device was lubricated, it would be lubricated

---

[3]Hockaday frequently used the generic term "derail" to refer to the entire derail mechanism, including the derail, its housing unit, and its operating stand.

all over (including the operating stand). (J.A. 220.)

Thus, all of his subsequent testimony flowed from the erroneous assumption that the lack of visible graphite lubrication on the operating stand's lever was somehow proof of a lack of lubrication of the derail itself. (J.A. 220.) This assumption, as the record demonstrates, was plainly wrong since, unbeknownst to Hockaday (J.A. 282), all such stands come from the factory with built-in lubrication. (J.A. 470, 544.)

After summarily concluding that the mechanism lacked lubrication, Hockaday inferred that NW would have known that there was a lubrication problem had it followed proper maintenance procedures. Hockaday concluded from his reading of Gearhart's discovery deposition that the

derails were lubricated only "when he thought they needed it" or after train crews complained they were difficult to operate. (J.A. 281.) This was flatly incorrect.

Hockaday testified that, according to Federal Railway Administration ("FRA") regulations, railroads must inspect derails and switches at least once a month. (J.A. 222, 268.) He admitted that there is no requirement that derails be lubricated on a regular schedule. (J.A. 250, 268.) The procedure followed by other railroads, and by Hockaday, himself, when he was a track inspector, was to report derails which were hard to throw to the track supervisor whose responsibility it was to lubricate the derails on an "as needed" basis. (J.A. 251.)

All evidence in this case shows that NW used this precise procedure. Track Supervisor Gearhart testified that the derail in question sits on a siding which is inspected every thirty days (J.A. 500-01), and that lubrication is applied based upon feed-back received from train crews who operate the equipment, or from the track inspector. (J.A. 471-72.) Gearhart's testimony, that he had never received any complaints on this particular derail (J.A. 473), was buttressed by the testimony of various other NW employees, who testified that the derail worked perfectly, both prior to and following this incident. (J.A. 157-58, 532.)

D. The Decisions Below

The trial court concluded:

> . . .I, having scrutinized Mr. Hockaday's testimony, taking that testimony in the light most

> favorable to Mr. Stover and giving Mr. Stover the benefit of all inferences fairly to be drawn from Mr. Hockaday's testimony, must conclude that it is grounded in surmise and conjecture rather than in objective fact.
>
> If we were in the realm of the jury deciding whether to accept or to disregard particular conclusions to be drawn from solid fact, we would be within the realm of jury questions. Though I submitted this case to the jury, I am now satisfied that the Supreme Court would not affirm a verdict based on Mr. Hockaday's testimony, and more to the point, I am satisfied that the case should not go to the Supreme Court with the plaintiff armed with a jury verdict that the trial judge has approved.
>
> Mr. Hockaday's testimony is indeed cobbled together based upon layers of surmise, conjecture and inference. I have scrutinized the record to see whether I believe the testimony of everybody else, taken together with Mr. Hockaday, or without Mr. Hockaday would support a liability verdict. The answer, unfortunately for Mr. Stover, is no.

(J.A. 594.) The court declared that if it had not set aside the plaintiff's verdict based upon the liability

determination, it would have done so based upon several evidentiary matters which prejudiced NW in its defense.

The Supreme Court of Virginia upheld the trial court's ruling, finding Hockaday's testimony entirely speculative, and that plaintiff wholly failed to establish foreseeability or negligence.

REASONS FOR DENYING THE WRIT

1. This fact intensive case was properly resolved below. Stover conceded that his case was insufficient to reach the jury without the aid of his expert's testimony. (App. 55.) His expert plied inference over assumption, basing his "opinion" on facts not supported by the record.

2. Stover's attempts to cultivate novel issues for review cannot eclipse the plain fact that he failed to

establish FELA negligence here. There was no showing of foreseeability. No one had ever complained concerning this derail, and it had been recently updated. All the evidence confirmed that if a lubrication problem were at work, the derail would have become increasingly more difficult to throw; yet the uncontradicted evidence, from numerous sources, was that this did not occur.

3. Stover could not show that a lack of lubrication existed or that it was a cause of his injury. The Supreme Court of Virginia did not, as plaintiff alleges, require him to prove that the railroad's negligence was the cause of his injury in order to present a jury issue. The court simply called upon him to introduce evidence that would support a reasonable inference that the alleged negligence was a probable cause of his

injury. Stover wishes to prevail upon a showing that a condition which might have existed, might have caused his injury. No decision of this Court supports such a result.

I. PLAINTIFF'S EVIDENCE IN THIS FACT-SPECIFIC CASE FAILED TO ESTABLISH NEGLIGENCE UNDER ANY STANDARD.

The issue in this case from the start was whether plaintiff could prove that his claimed difficulty in moving the derail lever was caused by an alleged lack of lubrication on the derail device. To take the derail off the track, as Stover was doing at the time of his injury, one lifts the Hayes stand lever up about six inches to free the locking mechanism, and then moves the lever to the right about 24 or 25 inches. (J.A. 546.) When the lever is fully lifted, the operating handle has a clearance from the locking mechanism of between 1/4 and

3/8 of an inch. (J.A. 546, 485-86.) If the lever is not lifted at least four inches, the stop will not be cleared and the lever is prevented from moving to the right to operate the derail. Lubrication has nothing to do with the process of how high the operator must lift the lever in order to activate the derail. (J.A. 486-87.)

Stover was the only witness to the alleged accident. His testimony did not establish that his inability to move the lever on his first try was occasioned by any malfunction of the derail. Specifically, plaintiff's testimony was: (1) he rode the train to Rocky Mount "every day but one a week," worked the derails, when there, on a daily basis, and never experienced any problem with this or the other two derails at Rocky Mount before September 11, 1990 (J.A.

127-28); and (2) he had made no complaint to NW about the condition of the derail before the accident. (J.A. 125-28.)

Because his own evidence did not establish any negligence on the part of NW, Stover passed the baton to his expert witness to try to create a cause of action. The Supreme Court of Virginia ruled that the expert's testimony was too flimsy and speculative to be credited.

Here, plaintiff conceded below that without Hockaday's testimony, he did not have a case. (App. 55.) Despite petitioner's creative efforts to transform a review of Hockaday's musings into a cert-worthy undertaking, any meaningful analysis of the record promptly reveals that Hockaday's testimony had no connection to the actual evidence in the case.

Hockaday's lack of familiarity with the derail and the new operating stand, and his lack of inquiry into its prior use or condition have been outlined previously, supra at pp. 11-15. Hockaday's conclusion that the "derail" lacked lubrication came through reliance upon only two sources: a group of five photographs, and the deposition of Gearhart, NW's Track Supervisor (J.A. 272.) The assumptions he made concerning the two sources of his testimony are clearly flawed, rendering his testimony nothing more than speculation piled upon speculation.

A. Hockaday's Conclusion that the Derail was not Lubricated Cannot Logically or Credibly Flow from the Photographs upon Which he Relied.

Hockaday reviewed five photos which he specifically relied upon in reaching his opinion. His statements concerning

those photos reveal volumes as to the liberties he took in "interpreting" them:

> Q. In fact those pictures you have in front of you, sir, that you testified about, do you know when they were taken?
>
> A. No, sir.
>
> Q. So you don't know if those conditions were the same as existed on the day of the accident?
>
> A. No, sir.

(J.A. 266-67.)[4]

Moreover, there is no dispute that the photos did not even show critical portions of the derail:

> Q. So the pictures you are looking at here, sir, they don't give you any indication at all whether or not that derail inside the housing has been lubricated?
>
> A. No, sir.

---

[4]In fact, the photographs upon which Hockaday relied (J.A. 249) were taken two months after the incident in November, 1990. (J.A. 68.)

(J.A. 275.)

* * *

Q. The only thing you know about from these pictures are the newly installed portions, the handle, and the connecting mechanism there; is that correct sir?

A. Yes, sir.

(J.A. 276.)

Hockaday testified that if he could not see lubrication in the photos in areas which are located in an "easy to observe" area of the operating stand, then he would assume that there was no lubrication in the more difficult to reach areas of the derail housing. (J.A. 220.) Hockaday's assumption that the stand was not lubricated was wrong. It is undisputed that it arrived pre-lubricated from the factory (J.A. 470, 544) and that the manufacturer did not recommend further lubrication (J.A.

545) -- facts of which Hockaday was simply unaware.

Q. But you have never seen one of these new levers from the manufacturer?

A. No, sir; I don't believe so.

Q. You have no knowledge of whether they come with lubrication built in or not, do you?

A. No, sir.

Q. This was a new lever, was it not?

A. Yes, sir.

Q. And do you know how many times that had been thrown before September 11, 1990?

A. I have no idea.

Q. Do you know if it had ever been thrown?

A. No sir.

Q. Do you know if Mr. Stover had ever thrown it before?

A. No, sir.

(J.A. 281-82.)[5]

Thus, based on a mistaken belief from the pictures that the new stand was improperly lubricated, Hockaday assumed that the derail housing unit was unlubricated as well.[6] Certainly, the pictures critical to Hockaday's testimony in this regard had no relationship whatsoever to the conclusion drawn from them. (J.A. 275.) His testimony in this regard is nothing but sheer speculation -- and speculation at odds with the evidence at that.

---

[5]Hockaday's total lack of knowledge as to the frequency with which the derail was thrown is particularly startling since his theory was that rust will build up if a derail is not used and lubrication is necessary to prevent such a situation. (J.A. 252.)

[6]In fact, there was pre-existing lubrication on the mechanism when the new stand was put in place. (J.A. 526.)

B. Hockaday's Conclusion that the Derail was not Lubricated Cannot Logically or Credibly Flow from the Deposition upon Which he Relied.

Hockaday further suggested that defendant would have known that there was a lubrication problem with this derail had it followed proper maintenance procedures. Hockaday concluded from his reading of Track Supervisor Gearhart's deposition testimony that derails were lubricated only after workers complained about them or when Gearhart thought it was necessary. (J.A. 280-81.)

The evidence of record made clear that NW's policy was to lubricate derails when either workers or inspectors noted problems (J.A. 471-72) and, consistent with FRA rules (J.A. 250), inspections of derails were conducted at least every thirty days. (J.A. 472, 501.) One reason Hockaday may have been ignorant of

NW's actual practice is that the deposition of Gearhart upon which Hockaday relied (J.A. 216-17) addresses NW's inspection practices in only the most superficial way.

Moreover, when Hockaday stated what steps are required by regulation for proper maintenance of derails, he essentially described NW's exact practice. (J.A. 268; see also J.A. 281.)

NW's actual inspection practices, consistent with the FRA rules, were unrebutted at trial. (J.A. 471-72.) All evidence in this case shows that the procedure described by Hockaday is the precise method followed by defendant. Track Supervisor Gearhart testified that this derail sits on a siding which is inspected every thirty days. (J.A. 500-01.) However, lubrication is applied based upon feedback received from train

crews who operate the equipment, or from the track inspector. (J.A. 471-72.) When complaints or requests are received, the derail will be lubricated or repaired before it is used again. (J.A. 472.)

Gearhart testified that he had never received any complaints on this particular derail. (J.A. 473.) This was supported by the testimony of Albert, the conductor of the local run (J.A. 178, 532), who would have passed any requests from his crew to Gearhart. H. C. St. Clair, the rear brakeman who regularly operates the derails in this area, testified that he had experienced no problems with any of the derails in the area, either before or after September 11, 1990, and that he knew of no other crew members who had experienced any problems. (J.A. 153, 157-58.) Plaintiff's own testimony confirmed this

derail's excellent performance history. (J.A. 126-28, 134.)

C. An Expert's Opinion Which is Neither Based Upon Facts Within his own Knowledge nor Established by Other Evidence is Speculative and Possesses No Evidential Value.

The heart of Stover's petition rests upon the contention that Hockaday provided an adequate foundation to support the jury's verdict in this case. The terminal flaw in Hockaday's testimony was that it stacked inference upon inference. His mistaken assumptions also, in critical respects, flew in the face of uncontroverted evidence. At bottom, Hockaday's opinions were unsupported by facts in evidence and utterly fail to prove that Stover was injured because the derail device was not properly lubricated.

To have probative value, an expert's opinion must be based upon facts specific to the case. An expert's opinion which is neither based upon facts within his own knowledge nor established by other evidence is speculative and possesses no evidential value. Thompson v. Southern Pacific Transportation Co., 809 F.2d 1167, 1169 (5th Cir.), cert. denied, 484 U.S. 819 (1987); Gilbert v. Summers, 240 Va. 155, 160, 393 S.E.2d 213, 215 (1990).

What facts, then, did Hockaday marshal to rationalize his opinion? He looked at photographs and declared that he saw no evidence of lubrication. He conveniently ignored that those photographs showed the new, pre-lubricated Hayes stand and not the working, metal-on-metal parts of the derail.

Hockaday compounded his erroneous assessment of the photographs by presuming that the absence of visible graphite on the exterior of the new stand meant there was no lubrication on the working parts of the derail which he could not see in the photos. (J.A. 275-76.) This inference is demonstrably inaccurate since the derail had pre-existing lubrication when the prelubricated stand was installed. (J.A. 526.)

Hockaday magnified his error by assuming that a person would not lubricate just one portion of a derail device. Thus, from the absence of visible lubrication on the external lever of the stand (as he interpreted the photographs) he inferred that the working portion of the derail had not been lubricated. (J.A. 220.)

In short, the pillars upon which Hockaday rested his opinion in this case cannot support his conclusions. He stated bluntly that he reached his conclusions based on the photos and Gearhart's deposition, prior to even reading plaintiff's deposition. (J.A. 272.) He did not test or even view the actual mechanism (J.A. 273), let alone inquire as to how often it was used (J.A. 273, 282) or its condition when it came from the factory. (J.A. 281-82.) Where his testimony is based exclusively on assumptions which are not supported by the facts of this case, his opinions are inadmissible and cannot be accorded weight.

Plaintiff's attempt to turn his petition into a study of whether he must prove "probable" or "possible" cause begs the question here. In this case there

exists no evidence of negligence other than wholly unsubstantiated speculation. Under these circumstances, under any standard, plaintiff's case falls.

II. PLAINTIFF PRESENTED ABSOLUTELY NO EVIDENCE THAT THIS INCIDENT WAS FORESEEABLE.

Stover's claim that his scant evidence presents a jury question is even more dubious when it is considered that the foreseeability of an injury is an essential element of negligence on the part of the railroad. Inman v. Baltimore & Ohio R.R. Co., 361 U.S. 138, 140 (1959); Norfolk & Western Railway v. Hughes, 247 Va. 113, 439 S.E.2d 411, cert. denied, 114 S. Ct. 2136 (1994). There is a complete dearth of testimony in the record that NW should have been on notice that Stover might injure himself on the mechanism in question. A failure to show that a condition is "foreseeably"

dangerous is fatal to claims under the FELA. See Inman, 361 U.S. at 140; Hurley v. Patapsco & Back Rivers R. Co., 888 F.2d 327, 330 (4th Cir. 1989).

Plaintiff, here, fails to reveal any evidence of complaints to put NW on notice of a problem concerning the derail. Indeed, just the opposite is true. The mechanism at issue was one of three derails with brand new operating stands located at Rocky Mount. The stand had been in place only six weeks. During this time plaintiff and others had used it on a daily basis without any problems or complaints. (J.A. 127-28, 157, 473.) While plaintiff contended that he had complained about various derails on the system, he specifically testified that he never complained about this particular derail. (J.A. 128, 139.) Track Supervisor Gearhart stated that he had

received no complaints concerning this derail. (J.A. 473.) Indeed, it was uncontested that the new stand made the derail much easier to throw than the older pipe-fitted derails. (J.A. 155, 543.)

The theory of plaintiff's negligence claim is that the derail so badly lacked lubrication that it became dangerous to throw. Surely, if this were true, plaintiff, or some other employee, during daily use of the derail, would have experienced and complained about the alleged condition during the weeks prior to this incident. Yet none did. Nor did NW's monthly inspection of the siding (J.A. 472, 500-01) reveal such a problem.

Even plaintiff's expert, Hockaday, confirmed that if a derail were improperly lubricated, it would become progressively harder to throw with each

passing day. (J.A. 283.) Yet, during the six weeks prior to this incident, plaintiff and his co-workers had thrown this derail on a daily basis with no problems whatsoever, a fact of which Hockaday was completely unaware. (J.A. 273.)

Hockaday further testified that if something is wrong with a derail, then some action must be taken to correct the problem in order for the derail to throw properly. Specifically, if the derail lacks lubrication, then lubrication must be added to correct the problem (J.A. 278-79). This testimony parallels that given by J. McCracken who also testified that a derail which lacks lubrication will get progressively harder to throw until it is lubricated. (J.A. 556-59, 574.) The uncontroverted evidence in this case, again, is that no lubrication

was added to this derail or operating stand for at least thirty days following plaintiff's incident. (J.A. 487.) Yet the derail was operated on numerous occasions after this incident by other witnesses, all of whom found the derail to be operating flawlessly. (J.A. 478, 497, 508-09, 532, 537.) Indeed, the very day plaintiff claimed it hung-up, NW officials threw the derail over one hundred times without any difficulty. (J.A. 508.)

Thus, the uncontroverted evidence, including plaintiff's own testimony, is that this "hang-up" was a single, isolated event, rather than a progressive problem due to a lack of lubrication. Plaintiff's lengthy discussion of Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) does not change this result. In Gallick, as plaintiff concedes, the

employer was on notice that its workers were forced to contend with a fetid pool and the related threats such a condition might spawn. Here, there is no evidence that a lack of lubrication existed, except through Hockaday's assumptions. Nor is there evidence of any perceived threat or complaint related to the derail in question. Indeed, quite to the contrary, the evidence from plaintiff himself is that this derail had never given him a moment's trouble, and that the mechanism had been recently updated.

III. THE VIRGINIA SUPREME COURT PROPERLY CALLED UPON STOVER TO INTRODUCE SOME EVIDENCE THAT THE NEGLIGENCE ALLEGED WAS A PROBABLE CAUSE OF HIS INJURY.

Plaintiff's evidence utterly fails to establish how the accident happened or that the derail mechanism actually malfunctioned. Plaintiff himself candidly conceded that the derail could

have "hung up" either due to a lack of lubrication or his own failure to lift the derail's lever high enough. Stover testified:

> Q. Do you remember saying at your formal hearing [Law Board proceedings] that when it hung up on you, you lifted up higher and came around with it?
>
> A. Yes, sir. I did jerk up on it and came around with it.

(J.A. 133-34.)

> Q. Do you remember telling the formal hearing that you might not have lifted up high enough on that?
>
> A. I don't remember what I said at the formal hearing. I have no idea.
>
> Q. Do you remember being asked, "Is it possible you didn't raise the handle up high enough to get by that groove?"
>
> A. Anything's possible.
>
> Q. That is what you said that day, isn't it, sir? You answered, "Anything is possible. Now, whatever, you know, when you are doing something, you are trying to pay attention to what

> you do. But I thought I had it all the way. I might not have had it up all the way. I do not know, and all I know is it hung."

A. That is exactly right.

(J.A. 135-36.) (Emphasis added.) That is ultimately why Stover conceded that his case, absent Hockaday's testimony, could not reach the jury. (App. 55.) At best, plaintiff has done nothing more than posit two possible explanations for the derail incident. He does not know which explanation actually caused the incident. For one possible scenario, NW has absolutely no culpability.

Stover seeks to skewer the Supreme Court of Virginia for stating that the plaintiff must, at least, introduce evidence supporting a reasonable inference that the alleged lubrication defect was the probable cause of his injury. Calhoun v. Honda Motor Co., 738

F.2d 126, 133 (6th Cir. 1984). (App. 56.) Without such a modest evidentiary showing, a jury could not find for the plaintiff except by raw speculation. Stover confuses the standard of Rogers v. Missouri-Pacific R. Co., 352 U.S. 500, 507 (1957) (whether negligence played any role in his injury) with his obligation to introduce evidence of negligence. An FELA plaintiff still must prove negligence. Ellis v. Union Pacific R. Co., 329 U.S. 649, 653 (1947). That, Stover plainly failed to do here. He should not expect to present a jury issue by insinuating that a condition might have existed, and that it might have contributed to his injury. Indeed, here there was no evidence that the disputed condition existed except Hockaday's guesswork based on assumptions not supported by the record.

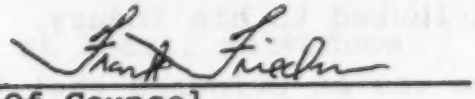
Ultimately, Stover argues that if he is injured, under the FELA he is entitled to reach a jury. As this Court has ruled on numerous occasions, however, an employer under the FELA is not an insurer of his employee's safety. Ellis, 329 U.S. at 653; Inman, 361 U.S. at 140. NW respectfully submits that this Court should decline plaintiff's invitation to rewrite this time-honored rule.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY COMPANY

By 
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